86-1074 (1)

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF
THE UNITED STATES

LOUIS G. EASTMAN,
CLYDE E. FLAUGH,
WILLIAM L. FRANKS,
EDWARD O. HILBERT,
JOHN D. HOSELTON,
JAMES D. JACKSON,
PAUL MAYHEW,
ELLIOTT REILLY,
TERRY TULLY,
Appellants/Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Appellee/Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

I

DID THE AGENCY (F.A.A.) COMMIT GROSS PROCEDURAL ERRORS IN THE PROCESSING OF THE PETITIONERS' REMOVALS?

II

DID THE AGENCY -- RESPONDENT PROVE THAT EACH OF THE PETITIONERS WAS STRIKING AND REBUT THE PETITIONERS' DEFENSES?

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STATEMENT OF JURISDICTION

On 4 September 1986 the Court of Appeals for the Federal Circuit affirmed the ruling of the Merit Systems Protection Board denying the petitioners reinstatement to their jobs as air traffic controllers and backpay from the date of their termination at Appeal No. 85-1304.

Petitioners file this petition for a writ of *certiorari* pursuant to Title 28, United States Code, §§1254 and 2101, and Rule 20 of the Rules of the United States Supreme Court.

STANDARD OF REVIEW

The scope of review is provided in Title 5, United States Code, § 7703(c) as follows:

> In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed;
>
> (3) unsupported by substantial evidence.

Since all citizens are guaranteed equal protection of the laws and are not to be deprived of property without due process of law, it is assumed that those guarantees are a part of the penumbra included in "or otherwise not in accordance with law."

QUESTIONS PRESENTED

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II

DID THE AGENCY -- RESPONDENT PROVE THAT EACH OF THE PETITIONERS WAS STRIKING AND REBUT THE PETITIONERS' DEFENSES?

STATEMENT OF THE CASE

STATEMENT OF FACTS:

GREATER PITTSBURGH INTERNATIONAL AIRPORT:

Chief Peter Bernhard, the deciding official and the agency's primary witness against the petitioners Louis G. Eastman, Clyde E. Flaugh, William L. Franks, Paul Mayhew, and Terry Tully, acknowledged that the evidence file contained under tab 11 of the agency's pre-hearing submissions as to each petitioner is the complete file upon which he relied to remove that petitioner and that it contained no evidence of that petitioner's having participated in striking, picketing or work disruption prior to his removal. See Pittsburgh transcript pp. 1274-1289. He stated that in each petitioner's case, there was a notation in the time and attendence report that each petitioner was absent without leave for no more than four days. See Pittsburgh transcript pp. 1275,

1293, 1296, 1308, 1342. He considered an order that was placed in the "read and initial file" cancelling all leave in the event of a national strike but could not state that any of the petitioners actually initialled the file in the block designating that order. Mr. Knopfel, another agency witness, stated that the sheets referred to some sort of video training rather than such orders. See Pittsburgh transcript pp. 2866-2899. All witnesses testified that there was little supervision to assure that all items and orders were read and that there was actually no time for each shift to read them. The notice was presumably placed in the file in June of 1981, the date was unclear.

Mr. Bernhard stated that he was so concerned for the safety and security of the facility during the period of the "strike" that he co-ordinated his activities with the County Police, the F.B.I., the United States District Court, and various other military

and civilian agencies. On 22 June and on 3 August 1981 he changed the locks on the door to the facility and hired security guards to protect people and property against expected violence. Contingency plans to protect navagational aids and other FAA property were instituted, and devices were installed to maintain surveillance of access and egress to and from the tower to supplement regular airline and FAA security. Mr. Bernhard did admit that he had good reason to believe that someone was making "phantom voice transmissions" to aircraft misdirecting air traffic. Mr. Bernhard admitted that such transmissions could be catastrophic in causing mid-air collisions and evidenced the activities of a lunatic. See Pittsburgh (Boylan) transcript at pp.1219-1249, 1440-1447.

Mr. Bernhard further conceded that the operation of his facility was still far below its pre-August 1981 level and that only flow restrictions imposed on the air carriers have

maintained any approach to normal operations. See Pittsburgh transcript pp. 1413-1419.

Mr. Bernhard conceded that he could not grant conditional leave by placing in advance contingencies on the leave granted by the terms of FAA orders and the collective bargaining agreement then in effect. He was, however empowered to cancel leave upon the occurrence of an emergency. See Pittsburgh transcript pp. 1244-1250. Mr. Bernhard offered no evidence that he cancelled any petitioner's leave, days or shifts off on 3 August 1981 or at any time thereafter. See Pittsburgh transcript pp. 1249-1250.

Mr. Bernhard testified that he mailed two copies of a letter proposing the petitioner's removal to each petitioner in envelopes with return addresses to the Eastern Region at JFK airport in New York. He had no knowledge as to when or if any envelopes were returned as undelivered. He acknowledged that the sole notice of proposed adverse action letter he used was the only

form letter sent by the FAA to him found under tab 4 of the agency's pre-hearing submissions. As "proposing official" he was given no other choice by his superiors in the nature of the proposals he was to make. See Pittsburgh transcript pp. 1368-1371, and tab 4 of the agency's pre-trial submissions as to each appellant. Additionally, when he was adjudicating their prosecution, he initiated as "deciding official" Mr. Bernhard was given a form decision letter to utilize (again no other choice but removal was given to him) which is found under tab 7 of the ageny's pre-hearing submissions. All Mr. Bernhard did was fill in the blanks with the controller's name and some dates to make his "decision." See Pittsburgh transcript pp. 1378-1379.

Although Mr. Bernhard forgot that the petitioners or anyone else was subjected to intimidation, threats and harassment in order to compel them to remain away from work, he admitted that he wrote all appellants'

exhibit 5 and posted Mr. Helms' letter which was admitted as all appellants' exhibit 2 both of which discussed their concern regarding intimidation, threats and harassment which was anticipated and was going on at Pittsburgh and other facilities. See Pittsburgh transcript pp. 1443-1447.

Mr. Bernhard admitted that he made no effort to inform the petitioners of the contents of GENOT 1/127 and GENOT 1/128 which were the general notices setting forth the "deadline" within which controllers were required to report to work with respect to their shifts and work days. These orders made clear that petitioner was required to report for his first shift beginning after 11:00 a.m. on 5 August 1981. Mr. Bernhard instead misinformed all by giving a faulty version over the news media and did nothing to correct the false impression he created.

LOUIS G. EASTMAN:

Mr. Eastman was a member of "B" crew

at Greater Pittsburgh International Airport under the supervision of Kenneth Erb and Daryl Knopfel. Mr. Eastman was a close personal friend and hunting companion of Supervisor Erb. See Pittsburgh transcript p.1791. When the "strike" began on 3 August 1981, Mr. Eastman and his crew were not scheduled to work as they were on their regular days off on 3 and 4 August 1981. Mr. Eastman received a telegram from the FAA telling him to report to his next scheduled shift. See Pittsburgh transcript p. 1779; and Eastman hearing exhibits 2 and 3. "B" crew's first scheduled shift since the beginning of the strike was at 3:00 p.m. Actually, Mr. Eastman was scheduled for FAM training which he completed on 5 August and was next scheduled to work at 3:00 p.m. on 6 August 1981. See Pittsburgh transcript pp. 1778-1789, agency pre-hearing submission at tab 11, p. 1. Mr. Bernard, the tower chief, announced over radio station WKQV, a news radio station, that all controllers who had

not reported to work by 11:00 a.m. on 5 August 1981 were fired (Pittsburgh transcript p. 1780). Similar statements were made by Mr. Bernhard and quoted in the newspapers. See all appellants' exhibits 7 and 8. Having heard conflicting reports from the news and the letter he received from the agency, Mr. Eastman went to the union picnic on the morning of 5 August 1981. There he heard the same information that he was fired. He had little to do with the union and didn't believe them. He and others drove to their supervisor's (Mr. Erb's) home to find out from someone they knew was in authority what their status was. Mr. Erb, who had been working that day and the two previous days, told Mr. Eastman and the others that they had better stick together as they were all fired as of 11:00 a.m. that day. See Pittsburgh transcript pp. 1790-1797. Mr. Matthews (Pittsburgh transcript p. 1474), Mr. Musone (Pittsburgh transcript p. 2636), Mr. Flaugh (Pittsburgh transcript pp. 2415-2417), Mr.

Rather (Pittsburgh transcript pp. 1521-1522), Mr. Benson (Pittsburgh transcript pp. 2705-2725), and others all testified that Supervisor Erb in fact told each of those present that they were fired, even though they had never been AWOL and had never participated in any strike at all. The agency offered no rebuttal even though they had Mr. Erb present and available as a witness. See Pittsburgh transcript pp. 2921-2928. Upon leaving Mr. Erb's home, Mr. Eastman sadly told Mr. Salonick (Pittsburgh transcript p. 2837) and Mr. Novitsky that none of them could return to work as they had all been fired. Having been fired by his agency, Mr. Eastman, who had a fine and unblemished record, felt deserted by the agency. He had done nothing wrong. He had been fired for no reason and had had that fact confirmed by his tower chief over the radio and his supervisor in person. He then began his attempts to rebut the "evidence" against him and contest his removal. He has

continued that fight to today.

Mr. Erb and Mr. Bernhard, rather than informing Mr. Eastman of the provisions of GENOT 1/127 (all appellants' exhibit 3) and GENOT 1/128 (all appellants' exhibit 4) misinformed him and others that they were not allowed to return to work for their first scheduled shift after the strike began and were fired because they had not returned to work prior to 11:00 a.m. on 5 August 1981 regardless of the letter to the contrary sent to Mr. Eastman from the agency. Mr. Eastman was never AWOL. His supervisor and tower chief told him he was fired and could not return. When he did what they told him to do he was fired for being AWOL and striking. Mr. Eastman and others protested their firing under such unfair circumstances by picketing the facility after they were fired. Mr. Eastman attempted to go to work but was told he could not by his direct superior and his tower chief. How then could he be said to be away without official leave or to be

participating in a strike.

The Merit Systems Protection Board returned others who were misinformed by Mr. Erb that they could not return to work at the same meeting under identical circumstances. See *Benson, et al. v. Federal Aviation Administration*, _____ MSPB _____, 1984 FMSR ¶845332, Docket No.PH075281F1021 (5 March 1984) in which the Merit Systems Protection Board held that the same misinformation given by the very same Mr. Erb to the appellants at the very same meeting constituted a negation of the charges of striking and AWOL, totally exonerating those appellants in the same precise situation as Mr. Eastman. If there is any justice or equal protection of the laws, Mr. Eastman should be treated equally and returned to work.

CLYDE EUGENE FLAUGH:

Gene Flaugh came to Greater Pittsburgh from Harrisburg International in 1978. See Pittsburgh transcript p. 2374. He observed

that PATCO was far more militant at Pittsburgh. Controllers who disagreed with the union leaders were denied training and would fail to check out on certain positions. Air safety was risked to retaliate against dissenters. As the "strike" deadline approached Mr. Flaugh noticed his neighbor, Jay Hurst, go to extremes to harass, intimidate and threaten those who voiced any disagreement with PATCO. "Scab" lists were posted, potential "scabs" were shunned, threatened, denied co-operation on the job and were subjected to job related distractions and other sophombric exercises in terror by militants at Pittsburgh and at Cleveland Center - the center controlling all non-local traffic about and around Pittsburgh with whom co-ordination was necessary to protect air traffic. See Pittsburgh transcript pp. 2377-2394.

The campaign of threats and violence was accellerated by PATCO National Director of Field Activities James Lundie who

threatened Mr. Flaugh and his wife Janice with violence as well as threats concerning Mr. Flaugh's career and future. Many witnesses testified to the threats made by Mr. Lundie who threatened the use of ball bats and noted that if a controller went to work, he was leaving his wife and family at home and easy to get to. He told the controllers that PATCO was an affiliate of the AF of L - CIO and would have assistance in enforcing "strike discipline" from other unions which were strong in Pittsburgh. See Pittsburgh transcript pp. 2334-2338, 2394-2397. When Gene Flaugh was only a boy in 1959, his father was assaulted with a shotgun and clubs and threats were made to his mother and the family during a labor dispute. See Pittsburgh transcript pp. 2338, 2363-2365, 2372-2373, 2441. Gene Flaugh and his wife knew of union violence first hand when they were threatened by Mr. Lundie. During the summer of 1981 Mr. Flaugh's father and wife both received threatening telephone

calls. The caller threatened to harm his wife and children if he did not support the union's proposed strike. See Pittsburgh transcript pp. 2339-2341, 2365-2366, 2397-2398, 2410-2411.

During the pre-strike period (the summer of 1981) Gene Flaugh observed the the FAA management. He had seen the FAA managers when they were PATCO leaders. He knew that Ken Erb, Daryl Knopfel, George Brugos and others had been PATCO leaders and supporters who had participated in previous PATCO Job actions or strikes. See Pittsburgh transcript p. 2393. He noticed that they did not help the victims of PATCO harassment and intimidation at all, but seemed to encourage the PATCO advocates intensify the pressure on those in disagreement with the proposed strike. See Pittsburgh transcript pp. 2398-2403. PATCO had even disposed of chiefs and supervisors before, they could certainly ruin a junior employee. See Pittsburgh transcript p. 2413. Jay Hurst went wild with no attempt

on the part of management to restrain him. See Pittsburgh transcript pp. 2387-2389. Those who failed to attend the 22 June 1981 "vote" were victimized even further, while management's response was a mere 24 July 1981 letter stating a weak admonition to those who were PATCO advocates, almost approving of their activities. See all appellants exhibit 5.

When 3 August arrived, Gene Flaugh, who had always opposed the job action, his wife and father had all been threatened. He felt he was fairly safe because he had 3, 4 and 5 August as regular days off. See Pittsburgh transcript pp. 2404-2415; all appellants' exhibits 7 and 8; and the agency's pre-hearing submissions, tab 11, p. 1. His first shift after the beginning of the "strike" was 3:00 p.m. on 6 August 1981. On 3 August he heard President Reagan's speech where a deadline was set for 11:00 a.m. on 5 August. Mr. Flaugh was scheduled for a physical exam at 1:00 p.m. on 5 August

which the agency cancelled and to work next at 3:00 p.m. on 6 August 1981. See Flaugh exhibit 2; Pittsburgh transcript pp. 2404-2415.

Frightened, but in a position to avoid a confrontation for a while, Mr. Flaugh heard the news coverage about phantom voices misdirecting aircraft, violence and threats throughout the nation. It seemed that the crazies were in control. Because his family had been directly threatened, he was visibly scared. The threat was real and management at Greater Pittsburgh would do nothing. On 5 August 1981 he went to a union picnic. He had not received his annual physical papers. He and others went to his supervisor Kenneth Erb's house to find out what their status was. Bernie Williams and some others were there. Later Louis Eastman and Dave Benson and other controllers arrived later. See Pittsburgh transcript pp. 1779-1780, 2705-2725. His supervisor, Mr. Erb told Gene Flaugh not to report to the facility because

he had already been fired at 11:00, even though the telegram (Flaugh exhibit 2) sent to him told him to report for his assigned shift (3:00 p.m. on 6 August) which had not yet arrived. See Agency pre-hearing submissions at tab 11, pp. 1 & 11; and Pittsburgh transcript pp. 2414-2418. Mr. Flaugh returned to the picnic and told Paul Nagle what he had heard. See Pittsburgh transcript p. 2515. From that point on Mr. Flaugh could only co-operate with the union who was supposed to be representing him. He had done nothing wrong. He was not AWOL. He had not participated in the strike. Although frightened he had gone to his supervisor to find out what to do and was told he couldn't return to work. The agency had not told him about GENOT 1/127 (all appellants' exhibit 3) and GENOT 1/128 (all appellants' exhibit 4) of which Mr. Erb and Mr. Bernhard must have been aware permitting Mr. Flaugh to return to work on 6 August 1981 at 3:00 p.m. Instead they misinformed him that he could not return

to work eventhough he had missed no work and had not picketed or participated in any strike actions. See all appellants' exhibits 7 and 8. The agency offered no rebuttal to the testimony regarding Mr. Erb's statement although Mr. Erb was available and testified at the hearing. Others who were victimized by the very same statement and were removed for failing to return to work after being misinformed by Mr. Erb were ordered back to work with backpay by the Merit Systems Protection Board. See *Benson v. Department of Transportation, supra.* It would seem only fair and just to allow Mr. Flaugh equal protection of the laws and order him back to work.

WILLIAM L. FRANKS:

Bill Franks and his wife Judy came to Greater Pittsburgh International Airport from Erie International. While at Erie, Bill learned much about PATCO at Pittsburgh and nationally from Pat Chiles. He particularly

recalled an event that occurred in Pittsburgh when he and Mr. Chiles came to Pittsburgh for a conference regarding a slow down action PATCO had proposed. He had been assaulted by George Brugos (later to become a supervisor at Pittsburgh) for his lack of enthusiasm for the proposal. Pat Chiles and Jim Means from Erie, had also told Bill Franks about an incident when they had walked out of a PATCO meeting and were abused ever since. Tom Kinsey and his wife Melissa, both from Erie, had told Bill about problems they had seen at Pittsburgh when they were there. Tom Kinsey had seen Paul Keimes destroyed at Pittsburgh by PATCO because he did not join the 1970 sickout when at Philadelphia. Steve Vucala was harassed and shunned for bidding on an EPDS (training) position without PATCO approval despite general knowledge that he was suffering the anguish of having his son near death during brain surgery. Retribution was taken against Tom Kinsey himself when he declined to shun Mr. Vucala privately as well

as at the facility. Having been unable to obtain training and co-operation at Pittsburgh due to PATCO resentment, Tom Kinsey failed to check out and was returned to Erie, where management and fellow workers agreed that he was an outstanding controller.

During the fall of 1980 the volume of pro-strike kiterature began to build up. President Ed Wintermeyer and Vice-President Jay Hurst of the local were promoting the strike. Bill Franks hoped it would never happen. Bill and Judy Franks heard about the proposedviolence at Erie from their friends there,. the Kinseys, the Chiles, and the Means. Bob Davis, a PATCO "choirboy" (goon), had threatened the families and persons of reluctant individuals there. Bill and Judy Franks attended a PATCO meeting with National Director of Field Activities James Lundie in June of 1981. Mr. Lundie told the controllers and their wives (this was the first time wives were invited) all about "strike discipline." Scabs' careers would be

destroyed and they would be unable to control traffic due to on the job pressure and harassment. A scab could run but could not hide as each new facility to which he might be assigned would be notified of the arrival of a scab. Mr. Lundie told his listeners that PATCO would be assisted by the members of other AF of L - CIO unions in Pittsburgh and that if you went to back to work you had to leave your family at home. The Franks, a rather meek couple, were horrified. At Erie, at Pittsburgh and acorss the nation PATCO meant to force a strike upon its membership. Crazies were in controll - what could one controller do?

On 22 June 1981 the "deadline" declared by PATCO was put back due to a new contract offer. The Franks were elated. Bill could go back to work and not have to fear retaliation. However, that dream was shattered by the militants at Pittsburgh. Bill, a member of "C" crew, observed pressure and intimidation brought to bear upon those

suspected of being weak in their devotion to PATCO and the impending job action. Keith Fauvie had come to Pittsburgh with an anti-PATCO reputation, and had failed to attend the 22 June meeting. He was shunned, harassed and victimized on the job. Threats were tossed around the facility. Nick Perella and Jim Musone, who had opposed the strike sentiments, were ostracized. Co-ordination was denied to "scabs" from Cleveland Center and at Pittsburgh. "Scab" lists appeared on the bulletin board. Tom Kinsey was denied communications on the job as was Nick Perella. Jay Hurst and Mike Painton constantly harassed suspected "scabs" and threatened them.

Management did nothing even though supervisors were present during these activities. "C" crew worked in an anarchy. The staff had no control over the PATCO crazies and made no effort to exercise any influence at all. The entire facility was run by PATCO, and those few leaders who

disagreed were too week and frightened to do anything. See all appellants' exhibit 5. PATCO had driven facility chiefs and supervisors out before. Other managers od the FAA (Erb, Patton, Brugos and Knopfel at Pittsburgh and Richard Peiffer and John Cianci at Erie) were militantly pro-PATCO and pro-strike. They had previously been strikers themselves. They let PATCO run wild. The Franks couldn't turn to management for help.

When the "strike" was called by PATCO on 3 August 1981, Judy and Bill Franks were terrified. They had to support the union if they were to remain healthy. Bill remained away from work on 3 and 4 August. He heard President Reagan's speech and felt he would have two days to let things blow over, until 11:00 a.m. on 5 August. That Wednesday he prepared to go to work. He went to the airport where Judy dropped him off. PATCO militants were there. He did not want to be discovered defying the union. he was afraid

for his family. He called home to get a ride back. Robyn Bylor, Cathy Cantlon and Ed Spring (Deputy Chief) all knew of the Franks' opposition to the strike and of the emotional breakdown of Judy and Bill Franks during the week of 3 August 1981. Bill Franks became withdrawn. He would break down and cry whenever the FAA and PATCO were mentioned. Judy Franks even wrote a letter to the Means in Erie describing their opposition to the strike, the pressures and the general situation. See Franks exhibit 2. The violence on the television and in the newspapers and the thought of the type of persons who were hoping for or trying to cause a mid-air collision was terrifying. They tried to put on a show of PATCO support. They backed PATCO on television and at meetings. As Judy became mote and more angry with the destruction of Bill's career she came to publicly oppose PATCO. Mr. Nestor, a militant PATCO supporter, threatened her to keep her nose out of union business. This

was the same man who management had permitted to fight with his assistant chief the job without taking any action.

Bill Franks stayed away from work because he was afraid for his family. He was nothing more than a coerced pawn in the struggle between PATCO and the FAA. He opposed the strike from the beginning and never withheld his labor to further the aims of a strike. See Pittsburgh transcript pp 1597-1759, 3530-3540; Franks exhibits 1, 2, and 3; and the depositions of James Means and Kathleen Cantlon.

PAUL MAYHEW:

Paul Mayhew came to Pittsburgh in 1978 from Cleveland Center. At Pittsburgh he learned that PATCO was even more militant than at Cleveland. As early as 1978 contract discussions began, and by 1980 with the rise of Robert Poli to the national presidency of PATCO, it became clear that the job action of 1981 was being heavily promoted. Militant

PATCO leaders felt omnipotent. The employees whom PATCO controlled could bring the FAA, air traffic, and the nation to their knees. The employees were told that only 80% participation was necessary to disrupt air traffic. If the FAA permitted air traffic to continue, "they would bring two together in three days." This horrible theme was repeated again and again from January of 1980 through the end of the job action and beyond. See all appellants' exhibit 6. In fact, the later news of misdirection of air traffic by "phantom voice transmissions" seem to confirm the fact that the insane element of PATCO was trying to assist in bringing such a catastrophe about. To Paul and Sheila Mayhew, even hoping for such a horrible occurrance evidenced sick and unstable minds capable of almost any violence.

Such sick minds had been at work at Pittsburgh. Controllers that incurred the anger of PATCO's leaders were "shunned." Shunning consisted of avoiding all

conversation with the controller - anywhere - and giving him co-operation and co-ordination on the job only when forced by circumstances. To refuse handoffs from the victim, to accept aircraft for him when he was already overburdened, to disregard all requests made by the controller were all methods employed by various militant controllers. Whenever events would cause the controller "to lose the picture" or "go down the tubes" would occur, all the supervisors would disappear. The entire group of supervisors at Pittsburgh had been PATCO leaders and participants in the 1970 sick-out. Many of them still vocally supported PATCO and the impending "strike." "C" crew, of which Paul Mayhew was a member, was in a state of total anarchy. One militant - Mr. Nestler - even assaulted their assistant chief, Mr. Kucala. Mr. Painton and Joseph Mastriani were other vocal advocates of the "strike." Management did absolutely nothing to restrain them. Harassment, threats, violence - all were

daily occurrances at Pittsburgh.

Paul and Sheila Mayhew were to discove that this type of tactic was a national policy of PATCO. James Lundie, National Director of Field Activities spoke to the controllers. He emphasized that it was necessary to have 80% participation in the strike in order to shut down air traffic and force the FAA to grant their demands. The spectre of mass deaths was raised again. PATCO would give the strikers their pay, support, legal representation and guidance. As for scabs, they would be driven from the profession by intimidation on the job. They would be unable to hide from PATCO and its AF of L - CIO affiliates by moving. If controllers went to work, they would be leaving their families at home. The Mayhews were horrified. They had no choice but to play along with PATCO or suffer the consequences of being a scab in Pittsburgh, the home of militant unionism. Thus, with management doing nothing to restrain the

militants and PATCO making very real and freightening threats to his family and career, Paul Mayhew, to protect his family and career felt compelled to remain away from work on 3 and 4 August 1981 when PATCO demanded it. After hearing President Reagan's speech on 3 August, his wife tried to calm his fears, but she was concerned herself. The deadline was 11:00 a.m. on Wednesday, 5 August 1981. Paul Mayhew's next shift was 3:00 p.m. No one told him what to do or when to go to work. Seeking safety in numbers he went to the airport early on the morning of 5 August with Dan Sanko and Regis Nelis. Only Felix Yerace, an elderly controller who was sick and close to retirement went in. Paul Mayhew walked about the airport. No one else went in. Discouraged and feeling that he was in an impossible position, Paul Mayhew went to a PATCO picnic and was told that he was fired at 11:00 a.m. His love for his family overcame his desire to work at Pittsburgh.

The news had been full of violence and incidents of misdirection of aircraft. The crazies were in control and he could do nothing but wait it out and hope for some sort of settlement. His family came first. See Pittsburgh transcript, pp. 2109-2112, 2726-2804; Mayhew exhibit 1.

TERRANCE TULLY:

Terry Tully, a member of "B" crew at Greater Pittsburgh International Airport, was aware of all of the active support for the "strike" that was offered by supervisors on his shift. Some of them had participated in "shunning" Terry for having been a scab in 1970. One of these leaders was Kenneth Erb, who was giggling and laughing while he read Title 18, United States Code, §1918 - half of which has been held to be unconstitutional in *United Federation of Postal Employees v. Blount*, 325 F.Supp. 879, *affd.*, 404 U.S. 802, 30 L.Ed.2d 38, 92 S.Ct. 80 (1971). Terry was opposed to the strike and said so rather

publicly as noted by witnesses Walter Welsch and Terry's wife. Additional witnesses to this were offered but refused by the presiding official. Mr. Tully was frequently reminded of how the union had gotten rid of prior chiefs and others who had opposed PATCO's methods. He knew that most of the supervisory staff had participated in the 1970 strike. They were all pro-PATCO and pro-strike.

Terry Tully and his wife listened to the speech by James Lundie and heard him threaten physical harm to controllers and their families if they were to become scabs. He heard threats of breaking legs, property damage, and of AF of L - CIO help in maintaining this "strike discipline." He heard all of the threats to his career and about denial of co-operation. He had suffered this treatment before himself and couldn't go through it again.

Mr. Tully had been scheduled annual leave from 3 August 1981 through 11 August

1981 on an unconditional basis pursuant to the collective bargaining agreement of 1978, still in effect during August 1981 and incorporated into FAA regulations. He and his wife travelled to New Jersey. They saw relatives and went to the shore. A neighbor, Mr. Walter Welsch told the U.S. Marshals where he was when they tried to serve him with a temporary restraining order. On 11 August he returned to Pittsburgh. He was told by Regis Nelis that he was fired along with the rest of the controllers. The following morning he picked up his letter notifying him he was to be removed from his job. See Tab 4 of the agency's pre-hearing submissions. On 18 August Mr. Tully was removed -- only six days after receipt of the proposal letter. No one contacted Terry Tully to cancel his leave.

The order cancelling all leave conditionally if a strike occurred in June of 1981 (PIT 7120.6) had been placed in a read and initial binder. Terry recalled something

about an earlier order. However, as held in the identical situation concerning the very same order, that order was ineffective to cancel scheduled annual leave. See *Benson v. Federal Aviation Administration, supra.* At any rate the table of punishments for disobedience of anorder (FAA ORDER 3750.4, Appendix 2, Table I, §5 would limit his punishment to a five day suspension. See Tully exhibit 1 at p. 7. Terry Tully was never AWOL and was never a participant in the strike. He was granted leave which was never effectively cancelled and was removed and refused permission to return to work when his leave was over. See Pittsburgh transcript pp. 2326-2330K, 2654-2697; Tully exhibits 1 and 2. Terry Tully tried to comply with his orders and the telegram sent to him and was fired. Mr. McNavish, Mr. Crawley and Mr. Nestler were all returned to duty under identical circumstances.

CHARLESTON, WEST VIRGINIA:

At Charleston, West Virginia, Kanawah County Airport, the PATCO local had such thugs as Anthony Battle and Bill Wallick as members and Robert Moore as a past member and supporter. Each witness who testified stated that he and his family was directly threatened by these "gentlemen." Anthony Battle was a former boxer and demonstrated his physical prowess at bars in the Charleston area from time to time. As the National PATCO "choirboy" (goon) Mr. Battle threatened the petitioners and their families directly with death. He often pointed out the firebombing of an EPDS (training) officer's car in the Washington, D.C. area as an example of what those who did not support the strike could expect. Mr. Wallick, a very large individual, similarly made direct threats of violence against his fellow controllers. His threats were testified to by independent witnesses with no interest in the outcome of the case. Robert Moore (Mr. Battle's fellow choirboy) was another

"gentleman" of violent tendencies. An independent witness, Mr. Smolak, was frightened to even mention his name a year after the events at trial.

Paul Arnholt, Chief of the Charleston facility, admitted that he followed directions of National Headquarters and Regional executives in processing removals. He exercised no decision making authority though he was the "deciding official" concerning petitioners' removals. Mr. Arnholt took many precautions to protect the facility from violence and sabatoge, and, like the petitioners, expected an outbreak of violence. He took precautions to keep employees away from Moore and Battle feeling that may harm others. Mr. Arnholt conceded that others were returned to duty after the "deadline" and were not removed due to physical ailments. See Charleston transcript pp. 133-142.

JOHN D. HOSELTON:

John Hoselton and his witnesses testified that he was opposed to the proposed strike. At a meeting in Mr. Hosleton's cellar of the controllers and their wives from Charleston, William Wallick told the petitioner and his wife that there was going to be a job action in the near future and repeated what he was told by Mr. Lundie and Mr. Kerr from the national union. Mr. Wallick threatened to harm those who wouldn't participate. Mrs. Hoselton became upset and left the meeting. Mr. Wallick went on to threaten anyone who went to work with a ball bat. See Charleston transcript pp. 836-838. Wallick went on to directly threaten the petitioner's wife. See Charleston transcript pp. 908-910. The petitioner was also threatened by Anthony Battle as early as May or June of 1981. See Charleston transcript pp.. 842-846. Mr. Hoselton had previously been the victim of PATCO anger before coming to Charleston and had been hospitalized as a result of the intimidation. He suffered from

ulcers and was given Tagamet. He went to see Dr. John Byrd, M.D. He could no longer do his job. If he were to again suffer as he had before at Dulles, he would be washed out of the FAA. In turn his concerns affected his performance as a controller. See Charleston transcript pp. 846-847.

On 3 August 1981 the petitioner didn't report for duty hoping that the job action would blow over. His table of punishments for being AWOL was merely a short suspension and a reprimand and he felt that was preferable to another ulcer attack or hospitalization. He and his' wife feared violence to themselves and their home. He heard President Reagan's speech. He figured he had two days to think over his position. He tried to placate the union. Anthony Battle demanded that Mr. Hoselton be with him when the deadline date drew near. Paul Arnholt had called and demanded that Mr. Hoselton report to work on Thursday (his next assigned shift after the deadline). Battle

reported those who went to work to someone out of town over the phone. Mr. Wallick had returned to work and was reporting what was going on at the tower. Mr. Hoselton knew that if he went to work he would be reported and his house and family were in danger. He became distraught. He talked to his doctor who wanted to hospitalize him, but the union didn't trust him. See Charleston transcript pp. 1006-1012. J.D. Hostelton went to Tony Battle's house as demanded rather than to work due to simple fear. Scabs were being victimized. His family was threatened. He had no choice. See Charleston transcript pp. 848-859.

Mr. Hoselton's illness and psychiatric problems and reactions to the threats made to him, his family, his employment were corroborated by his medical records and Dr. Byrd, who testified for him as well as his wife who was aware of his long standing opposition to PATCO and the job action. He wanted to dissassociate himself with the

entire undertaking. He had been victimized by PATCO before having had his career and health destroyed along with his first marriage. Perhaps more than anyone, J.D. Hoselton had real knowledge of the savage retribution which would be taken against him by the union if he had returned to work. He became physically and mentally ill from the stress and was literally compelled to remain away from work.

The agency offered no rebuttal to the evidence offered by the petitioner. He was threatened with death and harm to his family, home, career and his health failed him. He knew the threats were well founded as he had experienced such actions before. He was being watched as anti-unon and a probable scab.

JAMES JACKSON:

James Jackson and his wife were friends of Tony Battle and Bob Moore who had been on his crew. He had observed Tony

Battle physically beat several people. Mr. Battle made it clear to James Jackson and his wife that if he were to go to work during a job action that Mr. Battle or some of his associates would take care of him. Battle said he would make sure it was done. Knowing of Battle's violent nature, the jacksons believed him. See Charleston transcript pp. 1028-1031, 1080-1084. Bob Moore and Bill Wallick also made threats to the Jacksons. See Charleston transcript pp. 1031-1034, 1084-1086. The Jacksons had much to fear. They knew of the firebombing of a training officer's car near Washington, D.C. They knew the violence of which Tony Battle and Bob Moore were capable. They had been directly threatened with harm by them and Bill Wallick, a mountain of a man. They had little choice but to remain away from work and tell their reasons later, when the threat had subsided.

The agency offered no rebuttal to the Jacksons' testimony. Their relation of the

threats were corroborated by all of the witnesses who testified at the hearing. The Jacksons pointed out that they were employed in Charleston, West Virginia, the stronghold of the UMW and the possibility of violence resulting there in union matters was always present as in the Yablonski murder and the FASH/Teamster shootings.

ERIE, PENNSYLVANIA:

Coersive PATCO conduct began in Erie in 1980 when Robert Davis left the impression that he and other militant PATCO leaders were angry with the Erie membership for their lack of support for previous job actions. This type of criticism continued into 1981 and became more and more militant. Robert Huebert repeated to the petitioner that at a convention in Las Vegas a seminar was held on the destruction of navagational aids and the misdirection of air traffic. This impressed all hearers with the savage nature of those

in control of the union and indicated a willingness to participate in mass murder. At Ricco's Bar the controllers and their wives were subjected to direct and personal threats that Mr. Davis and his goons from the AF of L - CIO would enforce the strike with ball bats if necessary. Threats of on the job retaliation were also made. The controllers were reminded that when they went to work as scabs they would be leaving their families at home. Bill Franks from Pittsburgh and Tom Kinsey and Pat Chiles of Erie told their fellow controllers of PATCO retaliation at Pittsburgh and Cleveland Center. No one doubted that PATCO had the muscle to destroy a controller who had the audacity to oppose them. On 22 June 1981 the controllers were ordered to attend a meeting in Buffalo, New York. The PATCO militants were there in force. Chuck "Aminal" Howser, "Pinball" O'Conner, Bob Davis and a Chicago choirboy known as "Mad Dog" were there screaming "STRIKE! STRIKE! STRIKE!" while

pounding on the tables. Mr. Hilbert heard some of the leaders talking about taking reprisals against those who did not come to the meeting. He warned Mr. Chiles who had not come. The union had all of their home addresses and the Erie controllers were told that they were being watched by Carl Vaughan who was known as the "Godfather." During the weeks that followed those who had not attended the meeting were victimized by Cleveland Center and Buffalo through lack of co-operation causing near tragic results. Ed Case and Eddy Restor went to New York and reported back that Tony "Moon over Miami" Mamone and his fellow rabid PATCO followers were completely in control and were planning to follow scabs home and to blow up navagational aids. Ed Case, who travelled Texas to pick up his child, repeated the same attitude all along the way. On 31 July 1981 Mr. Poli called a job action for 3 August. Petitioner wanted no part of the situation. Even the chief, Mr. Tesore and all of the

supervisors testified that petitioner and others were merely intimidated into going along and not coming to work. On 2 August the controllers were again ordered to go to Buffalo. The crowd was even more rabid than the last time. Messangers were sent to "get" those who hadn't come. The leaders were openly hoping that the FAA would "bring two together in two or three days." The entire scene was frightening.

When 3 August arrived the picket line was set up. All were told to be there. PATCO leaders from Pittsburgh, Buffalo, Norfolk and Cleveland were on hand to check progress. Nearly 100 goons from the Central Labor Council destroyed a local Holiday Inn and assaulted a speaker and court reporter before deciding to come to the airport to picket. News reports of violence and misdirection of aircraft were common. The crazies were in control. On 5 August (the deadline) the controllers were again ordered to Buffalo. They were locked in a cellar

until the deadline had passed.

EDWARD D. HILBERT:

Ed hilbert heard all of the threats made to other Erie controllers as he and they testified at the hearing. He expressed his fears for the safety of the public and his family to his wife and to Ed Podpora, his long time friend. Mr. Hilbert overheard Stan Keppel, a PATCO leader talk ablut taking action against scabs on 22 June 1981 at Buffalo and warned Pat Chiles who had not attended. He also discussed union violence with Jim Vilotti, his neighbor, who warned him about what would happen to him if he were a scab. See Erie transcript pp. 746-748. Mr. Hilbert observed the goons who visited the Erie group from time to time before and during the job action. Ed Podpora told him and his wife of some of the violent characters in Buffalo and both felt they had a legitimate fear of retaliation by these leaders.

During the week of the strike Ed Hilbert was on annual leave. He was compelled to stand on the picket line to convince the goons he was with them. Mr. Tesore told Ed that his leave was revoked but never told him when to come to work as he was not scheduled or rescheduled. Thus, Mr. Hilbert was never away without leave. Since his presence on the picket line was for the safety of his family and preservation of his employment, rather than to coerce management to do anything, he was not a striker, but was only an elderly controller afraid to endanger his family or the public by being identified as a scab. As the deciding official, Mr. Tesore, testified, the removal of Mr. Hilbert did not promote the efficiency of the service. See Erie transcript pp. 746-835; Tesore transcript - trial exhibit 23 - pp. 39-40.

ALLEGHENY COUNTY AIRPORT:

At Allegheny County Airport, Chief

Paul Spanko consistantly displayed his PATCO union card and boasted about his active role in PATCO and the 1970 sick out. When the union leadership decided to call off the strike on 22 June 1981, Chief Spanko accused the controllers of having "no balls" because of their hesitancy. This was the leader whom the petitioner had to trust to protect him against PATCO retaliation. Mr. Spanko, the FAA's witness, testified that there was no picketing by the petitioner. The evidence file upon which he relied had no evidence of a strike. See Pittsburgh transcript pp. 464-469, 56-541. Mr. Spanko, as the other chiefs, admitted that he decided nothing but merely filled in blanks in his dual capacities as proposing and deciding officials. See Pittsburgh transcript pp. 541-548.

Mr. Spanko also admitted that none of the controllers would have been permitted to return to work after their "deadline", and:therefore, none of them withheld their

labor after that time. See Pittsburgh transcript pp. 454-476. Mr. Spanko acknowledged that he had been subjected to discipline due to the 1970 sick out.

ELLIOTT REILLY:

Elliott Reilly was, like many of his fellow controllers a rather mild gentleman. He knew of his chief's prior exploits in supporting PATCO strike activities. He had heard about Mr. Spanko flashing his PATCO card and his still avid support of PATCO. He had heard from Vaughan Williams and Larry Lipke some of the threats that were being made to the families of controllers who defied the union. He knew of militant members who had taken charge of the national union and the Pittsburgh local. See Pittsburgh transcript pp. 698-722, 725-738. Elliott Reilly also witnessed Chief Spanko telling him, Mr. Williams and Mr. Lipke that they had "no balls" to pull off a strike. See Pittsburgh transcript pp. 723, 738-740.

On 2 August the job action was called for the following day. Mr. Reilly was on annual leave from 2 August through 21 August 1981. His leave was never cancelled. He remained at home as instructed by his mailgram to "...report for duty on their scheduled shifts unless directed otherwise by facility management." See mailgram copy at tab 11 of the agency's pre-hearing submissions.

On 21 August, after the strike was over, when he arrived home, Mr. Reilly received a note from his daughter saying someone had called and said "if he doesn't report to work tomorrow, he'd be sorry." The note didn't seem to make sense. He awakened his daughter and questioned her. She said she was unsure as to what the caller had actualy said but felt it was a threat. Mr. Reilly called the Pittsburgh PATCO president and asked him who had made the threat but got no answer. He called Chief Spanko and told him of the threat, which confirmed the

threats made to families of controllers made earlier by Mr. Lundie. Mr. Spanko told Mr. Reilly to report to work the next day. Mr. Reilly still afraid for his family reported the incident to the police and the FBI. See Pittsburgh transcript pp. 739-751, 793-795. Mr. Reilly and his family stayed up most of that night. He decided he could not jeopardize his family and remained away from work the next day. On 23 August 1981 Mr. Spanko proposed Mr. Reilly's removal for one day's absence and removed Mr. Reilly on 3 September 1981. See agency's pre-hearing submissions at tabs 4 and 11. Needless to say Mr. Reilly, as found by the presiding official, did not participate in a strike. There was no strike going on when he remained away from work for the reason he told Mr. Spanko - to protect his family.

The maximum punishment for missing a shift according to athe agency's table of maximum punishments is a three day suspension. See FAA ORDER 3750.4, Table 1 of

Appendix 2 at p. 6 of petitioner's exhibit 1. No proof was ever offered that a strike was going on as late as 22 August 1981. In fact there were no absences that day at Allegheny County Airport other than Mr. Reilly. Therefore, punishment in excess of a three day suspension was improper according to the agency's own regulations.

ARGUMENT:

THE AGENCY COMMITTED GROSS PROCEDURAL ERRORS IN PROCESSING PETITIONERS' REMOVALS

Title 5, United States Code, § 7513(b)(2) provides that "a reasonable time, but not less than seven (7) days, to answer orally and in writing and to furnish affidavits and other documentary evidence on support of the answer..." shall be provided any employee whose removal is proposed. Petitioners Paul Mayhew and Elliott Reilly were not given the seven days. This deprived them of the time necessary to prepare and make a reply.

The case law is unequivocal. See *Stringer v. United States*, 90 F.Supp. 375, 117 Ct.Cl. 30 (1950); *International Manufacturers Co. v. United States*; 85 Ct.Cl. 683; *cert. denied*, 303 U.S. 651 (1938). In this case the petitioners showed that they were harmed by the failure to grant them the statutory period within which to present a defense. Others in similar circumstances were allowed by the deciding officials to return to work. See each appellant's exhibit 1 pp.9-79. Had the petitioners Mayhew and Reilly been permitted to reply orally or in writing, they may well have avoided removal.

The deciding official decided nothing in these cases. Mr. Tesore admitted that he was allowed no decision at all. See Tesore deposition transcript. Title 5 of the Code of Federal Regulations at §752.404(c)(20 provides that the agency will designate an official to hear the employee's oral answer "...who has the authority either to make or recommend a final decision on the proposed

adverse action." The Federal Personel Manual, Sup. 752-1, Subchapter S-7, §S7-1 provides that the deciding official "...did make the decision" to remove the employee. Here the deciding official decided nothing.

As to petitioner Reilly, there was no evidence in the evidence file, at the hearing or at any other time offered to demonstrate a strike was ongoing at the time of his short absence or that he participated in any strike. Since the Merit Systems Protection Board reversed the presiding official's reinstatement of Mr. Reilly without citing any such evidence the reversal was improper as was the removal in the first place.

II
THE AGENCY FAILED TO PROVE THAT THE PETITIONERS WERE STRIKING

The agency's evidence, as pointed out in the statement of facts, failed to demonstrate that the petitioners were striking. Petitioners Eastman and Flaugh

were clearly never even AWOL. They were ordered by the agency to report to their next shift in the mailgram each received. Before that shift arrived they were told by their chief, Mr. Bernhard and supervisor whom they sought out in person, Mr. Erb, that they were fired and could not return to work. They were fired for no reason as was found by the Merit Systems Protection Board in *Benson, et al. v. Federal Aviation Administration, supra.* That case reinstated the others who were told by Mr. Erb that they were fired. There is no reason to withhold reinstatement to Mr. Eastman and Mr. Flaugh.

All of the petitioners and their families were threatened with physical harm by PATCO militants in the event they went back to work. The threats and demonstrations of violence were sufficient to cause anyone of normal prudence great concern for their well being. No one should have to choose between their employment and their family's safety. See *Johnson v. Department of*

Transportation, 12 MSPB 187 (1982); *Letenyei v. Department of Transportation*, 735 F.2d 528 (Fed.Cir. 1984); *Martel v. Department of Transportation*, 735 F.2d 504, 509 (Fed.Cir. 1984). Particularly the threats of death and violence made directly to Mr. Jackson and his wife and to Mr. Hoselton and his wife would make anyone prefer to protect his family and risk the ire of an employer.

At most petitioner Tully was negligent in not memorizing all of the orders listed in a thick read and initial binder. He was granted leave. The leave was never revoked. He took his vacation and was fired for being absent and striking while on the Jersey shore. Under identical circunstances others who were granted identical leave subject to the same ineffective and illegal contingent revocation were reinstated. See *Benson, et al. v. Federal Aviation Administration, supra*. There is no possible reason to deny Mr. Tully reinstatement as well.

Mr. Hilbert was also on leave for the

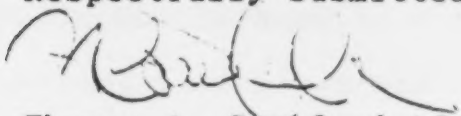
week of the alleged strike. The chief revoked his leave but never rescheduled him. The agency sent him a telegram telling him to report to his next scheduled shift. He was fired before his next scheduled shift arrived. He was never AWOL or striking. He was only a fearful elderly employee trying to protect his family.

Mr. Reilly told his chief, Mr. Spanko, who was a PATCO and strike advocate, that he received a threat. He also told the FBI and police. He missed one shift long after the "strike" was over and was fired, contrary to agency regulations, for missing one shift.

REASONS FOR GRANTING RELIEF

For the above reasons, the petitioners respectfully submit that the decisions of the Court of Appeals for the Federal Circuit be reversed and that the petitioners be reinstated in their employment as air traffic control specialists. The Merit Systems Protection Board and Court of Appeals for the Federal Circuit have decided important questions of federal law contrary to justice and precedent as well as inconsistantly as has been pointed out. Petitioners feel they have been denied due process of law and equal protection of the laws by their removals and lack of meaningful hearings of their defenses in a manner inconsistant with prior decisions of the Court of Appeals, This Honorable Court and the Constitution of the United States of America, and the statutes and regulations cited herein. Therefore the writ of *certiorari* should be granted.

Respectfully submitted,



Thomas A. Crawford, Jr.

No.

IN THE SUPREME COURT OF
THE UNITED STATES

LOUIS G. EASTMAN,
CLYDE E. FLAUGH,
WILLIAM L. FRANKS,
EDWARD O. HILBERT,
JOHN D. HOSELTON,
JAMES D. JACKSON,
PAUL MAYHEW,
ELLIOTT REILLY,
TERRY TULLY,
Appellants/Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Appellee/Respondent.

APPENDIX TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT'S ORDER OF 4 SEPTEMBER 1986 AFFIRMING THE HOLDING OF THE MERIT SYSTEMS PROTECTION BOARD DENYING THE APPELLANTS RE'NSTATEMENT AND BACKPAY

Counsel of record for these parties:

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LAWRENCE A. CRESS, ET AL.,
Petitioners,
v.

Appeal No.85-1304

DEPT. OF TRANSPORTATION,
FED. AVIATION ADMIN.
Respondent.

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DECIDED: September 4, 1986

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Before RICH, DAVIS, and SMITH, Circuit Judges

PER CURIAM

DECISION

The decisions of the Merit Systems Protection Board (board), affirming the petitioners' removal by the Federal Aviation Administration, Department of Transportation (agency), are affirmed.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive set of issues has been

authoritatively decided, the facts and legal arguments are adequately presented in the briefsand record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a). In this opinion, we shall address the main arguments raised by the 59 petitioners.

I. ALLEGATIONS OF PROCEDURAL ERROR BY THE AGENCY

A. Time Allowed for Response.

Petitioners argue that the agency erred in reducing the notice period from 30 to 7 days. This contention was rejected in *Schapansky v. Department of Transportation, FAA*, 735 F.2d 477, 486 (Fed. Cir.), *cert. denied*, 105 S.Ct. 432 (1984). Several of the petitioners allege that the agency erred by allowing them less than 7 days to respond to the agency's proposals to remove them but, even if this were so, there is no showing that such error was harmful. See *Adams v. Department of Transportation, FAA*, 735 F.2d

488, 490 n.3 (Fed Cir.), *cert. denied*, 105 S.Ct. 432 (1984).

B. Contention of Improper Influence by High Level Government Officials.

Petitioners contend "the 'deciding official' had nothing to decide" because the President of the United States had already decided to remove those controllers who had not returned to work by 11 a.m. on August 5, 1981. Petitioners fail to recognize that this argument was rejected in *Schapansky*, 735 F.2d at 486-87, holding that "[t]he President in no manner usurped the authority and responsibility of agency officials to determine whether each individual had continued to engage in the strike after the August 5, 1981 deadline." Furthermore, there is nothing improper in the Government's determination that all those who were found, after full opportunity to rebut the charges, to have engaged in the strike, would be removed. *DiMasso v. Department of Transportation, FAA*, 735 F.2d 526, 528 (Fed.

Cir.), *cert. denied*, 105 S.Ct. 432 (1984).

C. Contention of Inadequate Evidence of Strike Participation.

Petitioners fail to distinguish their cases from *Schapansky*, 735 F.2d at 482, holding that strike participation may be shown by evidence that the employee was absent without authorization during a strike of general knowledge. Petitioners do not even argue that the agency failed to make a prima facie showing under *Schapansky*, or that the showing was rebutted.

II. ALLEGATIONS OF PROCEDURAL ERROR BY THE PRESIDING OFFICIAL

Some of the petitioners make summary allegations that the presiding officials refused to hear witnesses in the interest of time. Petitioners fail to recognize that the conduct of hearings is a matter in the discretion of the presiding officials, which conduct is reversible error only if

petitioners can show an abuse of discretion. Petitioners' allegations are unsupported by reference to the record, the names of witnesses, the nature of the excluded testimony, or even the names of affected petitioners. Here there is no showing of abuse of discretion or of harmful error. 5 U.S.C. § 7703 (1982).

Petitioners also allege that certain presiding officials erred in denying some of the petitioners' discovery requests. Again, the petitioners failed to show an abuse of discretion or harmful error.

III. ALLEGATIONS OF FAILURE OF PROOF

A. Contention that Removal Is Too Severe for AWOL Charge.

Petitioners do not address the board's findings that they were removed not only for AWOL, but for being AWOL and for striking against the Government. In *Schapansky*, 735 F.2d at 484, the court rejected the contention that the penalty of removal for striking should have been mitigated, holding

that "[t]he penalty here was clearly not disproportionate to the offense."

B. Contention of Disparate Treatment.

Some of the petitioners contend that their removals should be reversed because they were treated differently from other controllers who participated in the 1981 strike. However, there is no attempt to show that these petitioners' conduct did not warrant removal. This court has held that "[u]nevenness of application of a penalty is no ground for invalidating it." *Schapansky*, 735 F.2d at 485. The court also held that removal of an employee for striking promotes the efficiency of the service. *Id.* at 484.

B. Contention that Management Supported the Strike.

Petitioners contend that agency supervisors seemed to support the 1981 strike; however, these contentions are not accompanied by any reference to the record. There is no showing that the alleged

statements caused the petitioners' participation in the strike to be involuntary. Striking cannot be excused by vague allegations of Government support, when there is no question that striking against the Government is illegal. 5 U.S.C. § 7311; 18 U.S.C. § 1918 (1982).

D. Contention of Misinformation About Deadline.

Some of the petitioners contend that they were told they would be fired if they didnot return to work by 11 a.m. on August 5, 1981; thus, they had no obligation to return to work after that time. These petitioners had a duty to seek any necessary clarification regarding the deadline, but they have not made the requisite showing that they attempted to return to work or that they satisfied their obligation to contact the facility. *Adams*. 735 F.2d at 490-91; *Anderson v. Department of Transportation, FAA*, 735 F.2d 537, 539-540 (Fed. Cir.), *cert*

denied, 105 S.Ct. 432 (1984); *Dorrance v. Department of Transportation, FAA*, 735 F.2d 516, 520 (Fed. Cir.), *cert. denied*, 105 S.Ct. 432 (1984).

E. Contention That Annual Leave Was Not Effectively Canceled.

Certain of the petitioners claim that their annual leave was not effectively canceled. However, the presiding official in each case found that the agency had canceled these petitioners' leave and that they failed to satisfy their duty to report for work on their scheduled shifts. The board's findings are supported by substantial evidence. 5 U.S.C. § 7703 (1982).

F. Contentions of Illness or Incapacity.

Certain of the petitioners allege that they were not participating in the strike but, that they had psychological and/or physical ailments which prevented them from reporting to duty. However, in each case substantial evidence supports the board's findings that the petitioners were not

incapacitated during the period they were charged with strike participation.

IV. ALLEGATIONS OF INADEQUATE REPRESENTATION

The Bangor, Maine, petitioners contend that their cases should be remanded because their allegations that counsel before the board was ineffective. These petitioners argue that counsel below erred in advising them that they should elect not to testify before the presiding official. However, the petitioners freely chose their counsel below and, having accepted the advice of counsel, they are not entitled to judicial relief. *Johnson v. Department of the Treasury*, 721 F.2d 361, 365 (Fed. Cir. 1983).

CONCLUSION

The board's decisions are affirmed because they were not arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law, were not obtained without procedures required by law, rule, or regulation having been followed, and were supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); see *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

We deny respondent's request that sanctions be imposed against petitioners and their counsel for filing frivolous appeal. We are satisfied that, while the appeal is without merit, a good-faith effort was made to distinguish this appeal from precedents against it.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LAWRENCE A. CRESS, ET AL.,[1] appellants,	)	
v.	)	DOCKET NUMBER PH075281F1031 et al.
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMIN., agency.	)	

OPINION AND ORDER

Having fully considered the appellants' petition for review of the three initial decisions involved, one issued on January 31 and two issued on February 1, 1983, and finding that it does not meet the criteria

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[1] These fifty-four appellants' cases, along with six others, were consolidated into three separate groups on appeal at the Regional Office which, after three consolidated hearings, issued three initial decisions (lead names: Anthony O. Battle, Sr. - Docket No. PH075281F0910; Joseph T. Boylan - Docket No. PH075281F1022; Edward V. Case - Docket No. PH075281F0924). One petition for review was filed with the Board by one representative on behalf of the fifty-four appellants covered by this Opinion and Order and listed in Appendix A. The Board has consolidated these fifty-four cases for decision on appellants' petition for review. See 5 U.S.C. 7701(f)(1).

for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.

Appellants submit no new evidence but reiterate the arguments made to and rejected by the presiding officials in their initial decisions. We find that the legal issues raised have been addressed and resolved by the Board in other related cases, that the presiding officials' findings as to those legal issues are essentially consistant with ours, albeit some of the lead cases had not been decided at the time the initial decisions were issued, and that any possible inconsistancy in the presiding officials' determinations on those issues could not effect the outcome of these appeals.[2]

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[2] The issues raised in the appellants' petition for review have been resolved in the following cases: *Ketchem v. Department of Transportation*, MSPB Docket No. DA075281F0713 (May 28, 1982) (official notice of the existance of an unlawful strike), *motion for clarification denied* (November 23, 1982);

Campbell v. Department of Transportation, MSPB Docket No. DE075281F0674 (April 25, 1983) (lockout, confusion as to deadline shift, period of participation in the strike sufficient to support the charges); *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 (October 28, 1982) (*prima facie* case of strike participation, shortening of the thirty day notice period, efficiency of the service, and reasonableness of the removal penalty); *Noa v. Department of Transportation*, MSPB Docket No. NY075281F0697 (April 25, 1983) (concerted action); *Johnson v. Department of Transportation*, MSPB Docket No. DC075281F0998 (November 10, 1982) (coersion); *Baracco v. Department of Transportation*, MSPB Docket No. NY075281F0895 (April 25, 1983) (opportunity to respond to notice of proposed adverse action within seven days, and harmful error); *Martel v. Department of Transportation*, MSPB Docket No. BN075281F0558 (April 25, 1983) (access to material relied upon by the agency); *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 (April 25, 1983) (deadline shift confusion, command influence); *Disiderio v. Department of the Navy*, MSPB Docket No. 4 MSPB 171 (1980) (AWOL alone as a cause for removal); *Ervin v. Department of Transportation*, MSPB Docket No. SL075281F0211 (July 16, 1983) (disparate treatment regarding varying deadline shifts); *Adams v. Department of Transportation*, MSPB Docket No. NY075281F0424 (April 25, 1983) (sanctions by presiding official); *Griffin v. Department of Agriculture*, 2 MSPB 335 (1980) (discretion of the presiding official in conducting the proceedings); *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980) (harmful procedural error of the agency); *Karapinka v. Department of Energy*, 6 MSPB 114 (1981) (prejudicial error of the presiding official). See also 5 C.F.R. §§1201.41-.81 concerning the presiding official's authority in various stages of the proceedings. Appellants allege disparate treatment with

respect to participants in the 1970 "sickout." There is no basis, however, on which to find that appellants are similarly situated to participants in the 1970 "sickout." Further, as found by the presiding officials, the record does not support the contentions of appellants Hollowell, Geiser and Huebert regarding their alleged untimely receipt or non-receipt of their notices of proposed removal. Finally, we defer to the presiding official's findings of fact that appellants Rather, Matthews, Salonick, Musone, Flaugh and Brown [must have neglected Eastman] were not mislead into failing to report for their deadline shifts by an alleged statement by an agency supervisor that they were fired as of 11:00 a.m., August 5, 1981. *Weaver, supra,* at 298-99. Appellants' credibility is deminished because they did not mention the alleged misrepresentation in oral or written replies to their notices of proposed removal [actually they made no such reply on advice of counsel then representing them]. Moreover, appellants have not satisfactorily established that the supervisor unequivocally stated that they were fired or that they would have returned as scheduled but for his remarks [These appellants testified that the supervisor, Mr. Erb, told them they could not return even though none had been AWOL as testified by many witnesses. All these appellants were at the supervisor's house to find out when to report to work and would not have been there if it was their intent not to go to work].

In addition, to the extent the arguments made in the appellants' petition relate to the presiding officials' factual determinations, we find that the appellants have not demonstrated any material factual error by the presiding officials, based on specific references to the record, sufficient to warrant the Board's full review of the record. See *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

The agency has also filed a petition for review of that portion of the initial decision dated February 1, 1983, which cancelled the agency's removal of appellants Elliott E. Reilly, Jr. and Ronald E. Shaw,[3] and substituted a sixty day suspension. Appellants have responded to the agency's petition.

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[3] These two appellants' cases were included in the initial decision under the lead name, Joseph T. Boylan - Docket No. PH075281F1022. They are among the 54 appellants covered by this Opinion and Order listed in Appendix A.

Appellants Reilly and Shaw, who were assigned to the Allegheny Tower, were removed by the agency based on charges of participating in an illegal strike and unauthorized absence. Reilly's strike participation and unauthorized absence (AWOL) were alleged to have occurred on August 22, 1981. and Shaw's on August 9, 1981.

In the intitial decision, the presiding official did not sustain the charges of strike participation against Reilly and Shaw, but did sustain charges of unauthorized absence. Based on the sustained charge of one day of AWOL, the presiding official found that the maximum reasonable penalty was a sixty day suspension. The basis of the presiding official's failure to sustain the strike participation charges was her finding that the agency had not established by a preponderance of the evidence that concerted strike activity continued after August 8,

1981.

In its petition for review, the agency contends that the presiding officia's finding that the agency did not ptove the charge of strike participation was erroneous. The agency argues that the preponderance of the record evidence, viewed as a whole, demonstrates that the agency established a *prima facie* case of strike participation which the appellants failed to rebut. See *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 (October 28, 1982); 5 U.S.C. 7701(c)(1); 5 C.F.R. 1201.56(c)(2) and .115(b).

The appellants argue in opposition, *inter alia*, that the presiding official's finding on the issue of strike participation on dates subsequent to August 6, 1981 was in accord with the requirement that the "agency must prove by direct evidence that a strike was in fact in progress, and employees could have returned to work." *See Ketchem v. Department of Transportation*, MSPB Docket No.

DA075281F0713 (May 28, 1982), *motion for clarification denied,* (November 23, 1982). Appellants also assert that they could not have been participating in a strike at the Allegheny County Airport because they were the only ones who were withholding labor on the dates charged August 9 and August 22.

The *agency's petition for review is GRANTED* PURSUANT TO % U.S.C. §7701(e)(1).

Paul Spanko, Tower Chief at Allegheny County Airport, testified that there was picketing at that installation from about August 5 or 6 until about Labor Day (September). Hearing Transcript at 377. In addition, the agency presented PATCO publications, "Presidential Update", dated September 25 and October 8, 1981; a decision of the U.S. Court of Appeals in *PATCO v. FLRA,* No. 81-2135 (D.D.C. June 11, 1982); and a Supplemental Opinion of Ronald W. Haughton, Chairman of the Federal Labor Relations Authority, concerning the strike's continuance until November. See Suppement to

Decision and Order at 3, November 3 1981, *supplementing* Decision and Order, Case No. 3-CO-105, 7 FLRA No. 10, October 22, 1981. Further the Board held in *Noa v. Department of Transportation,* MSPB Docket No. NY075281F0697 at 12-13 (April 25, 1983), that a single employee's action may be "concerted" for the purpose for the purpose of strike participation [no doubt causing the late Noah Webster undue stress through the strain of trying to understand how one person can "mutually contrive" a scheme]. Thus, these two appellants' assertion that they could not have participated in a strike at the Allegheny County Airport because they were the only two who were withholding labor on August 22 and August 9, is without merit [the Board intentionally misread the contention which was that each of the two appellants were the only *one* withholding labor on each of the respective dates and the contention agreed with common sense, common understanding of the English language and all

prior precedent; it only disagreed with the tortured meaning placed on the word "concerted" by bureaucrats intent upon upholding their employer's firing of these unfortunate persons who, of all persons involved were blameless]. Appellants cannot rebut the agency's *prima facie* case of appellants' strike participation at their facility by arguing that their deadline shift occurred after those of other controllers at their facility. See *Bangerter v. Department of Transportation,* MSPB Docket No. SL075281F0279 (September 27, 1983); and *Noa v. Department of Transportation, supra.*

There is no dispute that appellants failed to report for duty on the dates in question. The record also establishes that they could have returned to duty on those dates. By their failure to report, mwithout authorization or acceptable excuse, for their deadline shifts on those dates in the context of the ongoing strike of controllers at their facility [difficult to understand how there

was ongoing strike activity if all had been fired and picketed to protest their firing], and other relevant circumstances present, in support of its removal action. The Board finds that the agency has established that the strike at the Allegheny County Airport continued at least through August 22, 1981, and has supported its charges against the appellants by a preponderance of the evidence. Thus, the Board also finds that the charges against appellants Reilly and Shaw are SUSTAINED, and that the penalty of removal for the two appellants for the offenses charged and sustained was reasonable. See *Schapansky v. Department of Transportation, supra.*, at 8-11.

Accordingly, that portion of the Boylan initial decision, dated February 1, 1983, which did not sustain the strike participation charges against appellants Reilly and Shaw and substituted a suspension for the removal penalty in each of their cases is REVERSED. The Boylan initial

decision is AFFIRMED in all other respects.

The other two initial decisions (lead name, Anthony O. Battle, Sr., dated January 31, 1983, and lead name, Edward V. Case, dated February 1, 1983), shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

This is the final order of the Merit Systems Protection Board in these Appeals.

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD
SEP 30 1983
(Date)

/s/
Robert E. Taylor
Secretary

CERTIFICATE OF SERVICE

I hereby certify that 40 copies of the within petition were forwarded by first class mail to the clerk of the Supreme Court of the United States this 24th day of December 1986 and that two true and accurate copies were served by mail on the same date to:

Sandra P. Spooner
General Counsel for Litigation
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Thomas A. Crawford, Jr.